

## **NASD AWARD**

NATIONAL ASSOCIATION OF SECURITIES DEALERS, INC.

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In the Matter of the Arbitration Between

### **Names of Claimants**

Jerald Robert Kiernan and  
Andrew D. Kiernan

and

94-00598

### **Name of Respondent**

Piper Jaffray, Inc.

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## **REPRESENTATION OF PARTIES**

Claimants, Jerald Robert Kiernan and Andrew D. Kiernan were represented by Daniel J. Boivin, Esq. of Meshbeshier & Spence, Ltd., Minnetonka, Minnesota.

Respondent, Piper Jaffray, Inc. was represented by Daniel G. Wilczek, Esq. of Faegre & Benson, Minneapolis, Minnesota.

## **CASE INFORMATION**

A Joint Statement of Claim was filed with the National Association of Securities Dealers, Inc. ("NASD") by Claimants, Jerald Robert Kiernan and Andrew D. Kiernan on or about February 17, 1994.

Claimants' Submission Agreement was signed by Jerald Robert Kiernan and Andrew D. Kiernan on February 16, 1994.

The Statement of Answer was filed with the NASD by Respondent, Piper Jaffray, Inc. on or about April 12, 1994.

Respondent's Submission Agreement was signed on May 5, 1994 by Mark S. Reed, Assistant General Counsel of Piper Jaffray, Inc.

## **HEARING INFORMATION**

Pre-hearing conferences were held on:      February 16, 1995 for one (1) session;  
April 27, 1995 for one (1) session; and

July 7, 1995 for one (1) session.

The hearing was held on:

May 1, 1995 for two (2) sessions;  
May 2, 1995 for two (2) sessions;  
May 3, 1995 for two (2) sessions;  
May 4, 1995 for two (2) sessions;  
July 12, 1995 for two (2) sessions;  
July 13, 1995 for two (2) sessions;  
July 14, 1995 for two (2) sessions;  
September 11, 1995 for two (2) sessions;  
September 12, 1995 for two (2) sessions;  
September 13, 1995 for two (2) sessions;  
September 14, 1995 for two (2) sessions;  
October 26, 1995 for two (2) sessions;  
October 30, 1995 for two (2) sessions; and  
October 31, 1995 for two (2) sessions.

The hearing was held in Minneapolis, Minnesota.

### **CASE SUMMARY**

Claimants, Jerald Robert Kiernan ("J. Kiernan") and Andrew D. Kiernan ("A. Kiernan") (or collectively referred to as "Claimants") alleged that Respondent, Piper Jaffray, Inc. ("Piper Jaffray") unlawfully terminated Claimants' employment with Piper Jaffray on or about July 28, 1993.

#### **Jerald Robert Kiernan's Claim**

J. Kiernan alleged that he was an Investment Executive with Piper Jaffray since 1971 and through the time of his wrongful termination on or about July 28, 1993. J. Kiernan maintained that, during his tenure at Piper Jaffray his accomplishments included managing approximately \$200,000,000 worth of accounts at Piper Jaffray and having a broker-client relationship with approximately 2,500 clients. J. Kiernan contended that Piper Jaffray represented to him that he is the all time number one retail broker in gross sales in the history of Piper Jaffray.

J. Kiernan alleged that after he suffered a cardiac arrest in January of 1992, Piper Jaffray contacted his clients and informed them that their accounts would be transferred and/or assigned to other Piper Jaffray brokers and that Piper Jaffray transferred and/or assigned these accounts. J. Kiernan alleged that, following his cardiac arrest, various Piper Jaffray brokers were told to go after J. Kiernan's accounts because he was "not all there."

J. Kiernan maintained that Piper Jaffray made no attempt to provide him with any accommodations to allow him to return to work at Piper Jaffray. J. Kiernan alleged that he was capable of returning to work in July of 1993 and that Piper Jaffray was informed that two physicians were of the opinion that J. Kiernan should return to work. J. Kiernan contended that he was capable of returning to Piper Jaffray as an Investment Executive within the parameters provided by law in or about July of 1993.

J. Kiernan alleged that he was terminated from his employment on or about July 28, 1993. J. Kiernan asserted that Piper Jaffray's Chairman and CEO informed J. Kiernan's clients that he was "unable to preform the essential functions of the position of investment executive" and that he would not be returning to his employment with Piper Jaffray. J. Kiernan further alleged that Piper Jaffray owed him thousands of dollars in unpaid, but due, commissions in connection with his investment transactions.

#### **Andrew D. Kiernan's Claim**

A. Kiernan alleged that the reason he sought employment with Piper Jaffray was to work with his father, Jerald Robert Kiernan, with the intention of working with and taking over his father's investment accounts. A. Kiernan asserted that Piper Jaffray had an established policy of allowing its Investment Executives to pass their business on to their respective children once employed by Piper Jaffray. A. Kiernan further asserted that Piper Jaffray represented to Jerald Robert Kiernan that he would be allowed to pass his clients on to A. Kiernan once employed with Piper Jaffray.

A. Kiernan alleged that he was hired on a full time basis by Piper Jaffray in February of 1993 as a "Broker's Apprentice." A. Kiernan maintained that Piper Jaffray notified him on July 28, 1993, the same day Piper Jaffray terminated his father, that A. Kiernan's employment would be terminated effective July 31, 1993. A. Kiernan alleged that Piper Jaffray terminated his employment because of his father's disability.

Accordingly, J. Kiernan and A. Kiernan asserted claims, including: violations of the Americans with Disabilities Act; Violations of Minnesota Human Rights Act; Defamation; Tortious Interference with Contractual Relations; Tortious Interference with Prospective Contractual Relations; Violations of Minnesota Statute Section 181.145; and Breach of Contract.

Piper Jaffray denied all liability to Claimants in its Statement of Answer.

#### **Respondent, Piper Jaffray, Inc.'s Answer with Respect to Claimant, Jerald Robert Kiernan.**

Piper Jaffray contended that J. Kiernan had a long, successful career at Piper Jaffray as an Investment Executive. Piper Jaffray alleged that after J. Kiernan's cardiac arrest, he suffered anoxic encephalopathy: injury or death of neurons in the brain caused by acute oxygen deprivation. Piper Jaffray alleged that J. Kiernan's condition had severely and permanently impaired his cognitive abilities. Piper Jaffray maintained that in January of 1993, over a year after his cardiac arrest, J. Kiernan sought to return to work. Piper Jaffray alleged that it agreed to allow J. Kiernan to return to work on an initial basis, not performing all the regular work of an Investment Executive, but in a special position in which he would work with the brokers who had been handling his accounts during his twelve month absence. Piper Jaffray alleged that, because of J. Kiernan's damaged short term memory, he was prohibited from writing tickets, independently giving investment advice, or communicating with clients without the participation of the Investment Executive assigned to monitor the account.

Piper Jaffray maintained that after returning to work, J. Kiernan began exceeding the limits necessitated by his condition. Piper Jaffray alleged that it decided to obtain a thorough neuropsychological assessment of J. Kiernan. Piper Jaffray contended that the conclusions of these tests indicated that J. Kiernan suffered from significant deficits. Piper Jaffray alleged that it concluded that J. Kiernan no longer possessed the mental capacity necessary to be an Investment Executive. Piper Jaffray asserted that it continued to allow J. Kiernan to work with the monitoring brokers, but that this exercise proved to be futile. Piper Jaffray maintained that it obtained another neuropsychological exam which further established that J. Kiernan could no longer function as a competent Investment Executive. Piper Jaffray alleged that, although it concluded that J. Kiernan could not perform the essential functions of an Investment Executive, Piper Jaffray did not terminate J. Kiernan's employment, but that he resigned.

**Respondent Piper Jaffray, Inc.'s Answer with Respect to Claimant, Andrew D. Kiernan.**

Piper Jaffray alleged that it hired A. Kiernan in 1993 at his father's request. Piper Jaffray asserted that it emphasized that A. Kiernan would have to prove himself and was not being hired to take over his father's book of business. Piper Jaffray maintained that once A. Kiernan was hired, he focused solely on his father's clients. Piper Jaffray contended that A. Kiernan was completely unqualified to "take over" his father's clients. Piper Jaffray alleged that A. Kiernan was given the opportunity to continue at Piper Jaffray, which he refused. Piper Jaffray asserted that A. Kiernan did not want to work at Piper Jaffray, but that he wanted to take advantage of his father's clients.

**RELIEF REQUESTED**

Claimants requested that the panel:

1. Order Piper Jaffray to make J. Kiernan whole by providing him with approximate lost earnings and benefits in excess of \$10,000,000, with pre-judgment interest and other affirmative relief necessary to eliminate the effects of Piper Jaffray's unlawful employment practices.
2. Order Piper Jaffray to make J. Kiernan whole by providing compensation of an undetermined amount for pecuniary losses including, but not limited to emotional pain, suffering, inconvenience and mental anguish.
3. Order Piper Jaffray to pay J. Kiernan punitive damages of an undetermined amount.
4. Order Piper Jaffray to make A. Kiernan whole by providing him with approximate lost earnings of an undetermined amount, with pre-judgment interest and other affirmative relief necessary to eliminate the effects of Piper Jaffray's unlawful employment practices.
5. Order Piper Jaffray to make A. Kiernan whole by providing compensation for pecuniary losses and non-pecuniary losses of an undetermined amount including, but not limited to emotional pain, suffering, inconvenience and mental anguish.
6. Order Piper Jaffray to make A. Kiernan whole by providing for punitive damages of an undetermined amount.
7. Order Piper Jaffray to make J. and A. Kiernan whole by awarding them costs and disbursements including reasonable attorneys' fees.
8. Such further and other relief deemed just, fair and equitable.

Respondent, Piper Jaffray requested that the claims asserted against it be denied in their entirety and that it be awarded its costs and attorneys' fees.

#### **OTHER ISSUES CONSIDERED & DECIDED**

The parties have agreed that the Award in this matter may be executed in counterpart copies or that a handwritten, signed Award may be entered. In either case, the parties have agreed to receive conformed copies of the award while the original(s) remains on file with the NASD.

#### **AWARD**

After considering the pleadings, the testimony, and the evidence presented at the hearing and the post-hearing submissions, the undersigned arbitrators have decided in full and final resolution of the issues submitted for determination as follows:

1. The Statement of Claim is hereby dismissed with prejudice;
2. The panel finds that Claimant, A. Kiernan failed to meet his burden of proof that he was entitled to damages;
3. The panel finds that Claimant, J. Kiernan failed to meet his burden of proof that on July 28, 1993 he was able to perform the essential functions of account executive with reasonable accommodations while employed by Piper Jaffray;
4. The panel makes no determination that J. Kiernan could or could not perform the essential functions of an account executive after July 28, 1993;
5. Forum fees shall be divided between the parties;
6. Other than forum fees which are specified below, the parties shall each bear their own costs, expenses and attorneys' fees incurred in this matter; and
7. Any relief not specifically enumerated is hereby denied.

#### **FORUM FEES**

Forum fees are calculated at the rate of \$1,500 per hearing session and \$300 for each pre-hearing conference, if any. There were three (3) pre-hearing sessions x \$300 = \$900 in forum fees. There were Twenty-Eight (28) hearing sessions x \$1,500 = \$42,000 in forum fees. Total forum fees = \$42,900. Pursuant to §44(b) a hearing session is any meeting between the parties and the arbitrator(s), including a pre-hearing conference with an arbitrator, which lasts four (4) hours or less.

Pursuant to §44(c) of the NASD Code of Arbitration Procedure, the National Association of Securities Dealers, Inc. ("NASD") shall retain the \$500.00 non-refundable claim filing fee and shall retain the \$1500.00 hearing session deposit previously deposited with the NASD by the Claimants.

Claimants, J. Kiernan and A. Kiernan are jointly and severally assessed, and shall pay to the NASD forum fees in the amount of Nineteen Thousand Nine Hundred Fifty Dollars and No Cents (\$19,950.00).

Respondent, Piper Jaffray is assessed, and shall pay to the NASD forum fees in the amount of Twenty One Thousand Four Hundred Fifty Dollars and No Cents (\$21,450.00).

The NASD shall retain postponement fees in the amount of \$1,500.00 previously deposited with the NASD by the Claimants.

Forum Fees assessed to the parties are payable to the National Association of Securities Dealers, Inc.

Signatures of Concurring Arbitrators, Banga and Powers:

/s/ Angela R. Banga  
Angela R. Banga  
Public Arbitrator  
Panelist

February 28, 1996  
Dated

/s/ Mary E. Powers  
Mary E. Powers  
Industry Arbitrator  
Panelist

March 1, 1996  
Dated

Special Concurrence of Arbitrator Elmquist:

I concur that Claimant, J. Kiernan did not meet his burden of proof that he could perform the essential functions of an account executive on July 28, 1993.

Saying that, however, is not enough. J. Kiernan spent 25 years devoting his life to Piper Jaffray. He was instrumental in building the Wayzata office from nothing to a powerful profit center in the Piper Jaffray system. After his cardiac arrest, it was obvious Mr. J. Kiernan would need very special accommodations if he was ever to return as an account executive. His accounts were disbursed among other brokers and he was urged to collect his insurance disability as "payment" for his book of business. No serious effort was made by Piper Jaffray to work J. Kiernan back into the system because no one at Piper Jaffray believed he could contribute again in any meaningful way. Unfortunately, what rehabilitation efforts Piper Jaffray did make backfired as it realized that J. Kiernan was still a threat to take the clients and go elsewhere.

Perhaps most distressing of all was the July 28, 1993 letter sent by Piper Jaffray under Addison Piper's name. This letter was guaranteed to generate litigation. How such a letter could pass muster with management and corporate counsel will certainly remain a mystery locked up in the fear Piper Jaffray must have viewed J. Kiernan's departure. By July 28, 1993 J. Kiernan had retained counsel. An adversarial relationship existed. There is no excuse for not giving J. Kiernan as a Piper Jaffray employee or his counsel a chance to review such a hurtful letter for comment prior to its being sent.

Of all the options available, Piper Jaffray chose to send the letter and bet a million dollars on its interpretation of some new and difficult legal concepts. It was an unwise decision by any standard.

Signature of Special Concurring Arbitrator, Elmquist

/s/ Jack D. Elmquist  
Jack D. Elmquist, Esq.  
Presiding Chairperson  
Public Arbitrator

February 27, 1996  
Dated

For NASD use only:  
Date award served on the parties: March 5, 1996